Supreme Court, U.S.
FILED
021612 APR 30 2003
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

SALLIE B. HOLLOWAY,

Petitioner,

v.

HANSFORD T. JOHNSON, Acting Secretary of the Navy; CHIEF OF NAVAL PERSONNEL, Washington, DC; CHIEF, NAVAL RESERVE PERSONNEL CENTER, New Orleans, LA; COMMANDER, NAVAL RESERVE FORCE, Washington, DC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JAMES BYRON HOLCOMB
Attorney for Petitioner
P.O. Box 10069
Bainbridge Island, WA 98110
(206) 842-8429

180194

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

66 pp

QUESTIONS PRESENTED

Whether the U.S. Court of Appeals for the Ninth Circuit has entered a decision in conflict with the a decision of the U.S. Court of Appeals for the Fifth Circuit on the issue of whether Mandamus jurisdiction in conjunction with declaratory relief is available in a U.S. District Court to declare as to the validity of a regulation required by statute and award monetary relief, when the U.S. Court of Federal Claims has determined previously that the U.S. Court of Federal Claims, as to the claims in each of the Circuits, does not have jurisdiction to award monetary relief under either regulation or statute?

Whether the Petitioner has been denied access to all possible Courts where both a U.S. District Court in Petitioner's case and the U.S. Court of Federal Claims in another case as to the same claim have declined to review a regulation of a military service for declaratory relief under its statutory jurisdiction and when each of the Courts state that jurisdiction resides in the other?

Whether the concept of "justiciability" has any application in either a U.S. District Court or the U.S. Court of Federal Claims when either court sits on appeal of a decision of a military correction board under the board's subject matter jurisdiction conferred by Congress "to correct error or remove an injustice"?

PARTIES TO THE PROCEEDING

Petitioner is Sallie Holloway (hereinafter "Holloway") who is a Naval Reserve Officer, presently serving at the rank of Captain (pay grade 0-6) in the active Reserve and who was on active duty in the United States Navy as a Reserve Officer at the rank of Commander (pay grade 0-5) when released from active duty to the active Reserves.

Respondent Hansford T. Johnson is the duly appointed acting Secretary of the Navy named in his official capacity.[1] The Respondents Chief of Naval Personnel, Chief, Naval Reserve Personnel Center, and Commander, Naval Reserve Force, are named in their official capacity in terms of assignment.

---

1. Johnson has recently been appointed as the Acting Secretary of the Navy to replace Gordon R. England who has been appointed as the Assistant Director of the Department of Homeland Security.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Cited Authorities	vi
Table of Appendices	ix
Opinions Below	1
Statement of Jurisdiction	1
Constitutional, Statutory, Civil Rule, And Regulatory Provisions Involved	1
Statement of the Case	5
A. The Federal Court system conflict in terms of TERA	5
B. Proceedings Below	7
Reasons for Granting the Writ	8
I. Mandamus Jurisdiction Coupled with Declaratory Relief	8
A. Policy	8

Contents

Page

B. The Writ Should Be Granted to Decide Whether a U.S. District Court Has Jurisdiction under Mandamus Jurisdiction 28 U.S.C. § 1361 in Conjunction with Declaratory Relief When the U.S. Court Of Federal Claims Has Held It Is Without Jurisdiction to Declare Relief for the Same Claim for Monetary Relief 9

II. Denial of Access to the Federal Court System 11

A. Policy 11

B. All Courts Having Possible Jurisdiction to Review Holloway's Claim Have Held That Each Does Not Have Jurisdiction to Review That Claim and, Indeed, Affirmatively Indicate That the Claim Resides in the Other Court 12

III. "Justiciability" Should Not Be Ascribed by Either a U.S. District Court Or the U.S. Court of Federal Claims to a Claim by a Military Reserve Officer When Either Court Reviews a Decision by a Military Correction Board Established under 10 U.S.C. § 1552 under Concepts of Subject Matter Jurisdiction ... 16

A. Policy 16

Contents

Page

B. No Case in the Ninth Circuit Or in the Court of Appeals for the Federal Circuit Or in the U.S. Court of Claims Or in this Court Has Squarely Held That Review by a Court of a Decision by a Military Correction Board Removes Review of That Case from the Concept of "Justiciability" on the Ground That the Reviewing Court Is Limited in Its Review to the Scope of the Subject Matter Jurisdiction Conferred on a Correction Board 17

Conclusion 21

TABLE OF CITED AUTHORITIES

Page

Cases:

Adair v. United States, 648 F.2d 1318 (Ct. Cl.) 10

Fisher v. United States, No. 02-5082 (CAFC) 20

Greek v. United States, 44 Fed.Cl. 43 (1999) 6, 7, 9

Guerrero v. Stone, 970 F.2d 626 (9th Cir. 1992) ... 15

Harmon v. Brucker, 355 U.S. 579 (1958) ...7, 11, 13, 14

Larionoff v. United States, 431 U.S. 864 (1977) ... 13

McMullen v. United States, 50 Fed. Cl. 718 (2001) 6, 7, 9, 19-20

Murphy v. United States, 993 F.2d 871 (1993) ... *passim*

Reale v. United States, 208 Ct.Cl. 1010, *cert. denied*, 429 U.S. 854 (1976), *cert. denied*, 429 U.S. 988 (1976) 19

Sanders v. United States, 594 F.2d 804 (Ct. Cl. 1979) 14, 19

Sawyer v. United States, 18 Ct. Cl. 860 (Cl. Ct. 1989) 19

Cited Authorities

Page

Testan v. United States, 424 U.S. 392 (1976) .... *passim*

Turner v. Weinberger, 728 F.2d 751 (5th Cir. 1984) 8, 9, 10

Statutes:

5. U.S.C. § 701(a)(2) 15

5 U.S.C. § 702 ..... 2, 15

10 U.S.C. § 1293(n) 2, 3

10 U.S.C. § 1552 ..... 2, 16, 18

10 U.S.C. § 10209 6

10 U.S.C. § 12313 ..... 2, 17

10 U.S.C. § 12731a 3

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 ..... 3, 15

28 U.S.C. § 1361 ..... 3, 9, 14

28 U.S.C. § 1491 4

Cited Authorities

	Page
28 U.S.C. § 2201	4, 15
28 U.S.C. § 2202	4, 15
United States Constitution:	
Fifth Amendment (Due Process)	1, 7
Rules:	
Federal Rules of Civil Procedure 12(b)(1)	8
Federal Rules of Civil Procedure 57	4, 15
United States Supreme Court Rule 10	8, 11, 16

TABLE OF APPENDICES

Page

Appendix A — Memorandum Decision Of The United States Court Of Appeals For The Ninth Circuit Dated And Filed October 11, 2002 ..... 1a

Appendix B — Order Of The United States District Court For The Northern District Of California Dated January 31, 2001 ..... 8a

Appendix C — Order Of The United States District Court For The Northern District Of California Dated October 18, 2000, Filed October 19, 2000 And Entered October 20, 2000 ..... 16a

Appendix D — Order Of The United States Court Of Appeals For The Ninth Circuit Denying Petition For Rehearing Dated And Filed February 4, 2003 ..... 34a

Appendix E — Navy Regulations Involved 35a

Petitioners respectfully petition for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals in this case.

OPINIONS BELOW

The Ninth Circuit opinion (App. A) is unreported. The district court opinion (App. B) is also unreported. The district court opinion (App. C) is also unreported. The Ninth Circuit Opinion On Rehearing En Banc (App. D) is also unreported.

STATEMENT OF JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on October 11, 2002. The Court of Appeals entered an order denying a timely petition for rehearing en banc on February 4, 2003.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, CIVIL RULE, AND REGULATORY PROVISIONS INVOLVED

Constitution:

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

Statutes:

5 U.S.C. § 702 provides in pertinent part:

> A person suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof . . .

10 U.S.C. § 1293n., entitled: "Twenty years or more: warrant officers" provides in pertinent part at note (as to Navy):

> n. (b)(2) During the active force drawdown period, the Secretary of the Navy may—
>
> (A) apply the provision of section 6323 of such title [section 6323 of this title], to an officer with at least 15 but less than 20 years of service. . . .

10 U.S.C. § 1552 provides in pertinent part:

> (a)(1) The Secretary of a military department may correct any military record of the Secretary's department when the Secretary considers it necessary to correct an error or remove an injustice . . . acting through boards of civilians of the executive part of that military department.

10 U.S.C. § 12313(a) provides:

> Except as otherwise provided in this title, the Secretary concerned may at any time release a Reserve under his jurisdiction from active duty.

10 U.S.C. § 12731a(c) provides:

> (1) The Secretary concerned may limit the applicability of subsection (a) to any category of personnel defined by the Secretary in order to meet a need of the armed force under the jurisdiction of the Secretary to reduce the number of members in certain grades, the number of members who have completed a certain number of years of service, or the number of members who possess certain military skills or are serving in designated competitive categories.[2]

28 U.S.C. § 1331 provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S. C. § 1361 provides:

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

---

2. The regulation cited in Appendix e herein does not cite to the statute which applies to implement TERA whether it be this statute as to Reserves generally or to 10 U.S.C. § 1293n. above. Holloway is a Reservist and 10 U.S.C. § 12731a above should apply, both for this reason as well as interpreting fairly what is meant by this statute in relation to the Reserve Personnel Management Act as a whole, of which § 12731a is a part.

28 U.S.C. § 1491 provides in pertinent part:

> (a)(1) The United States Court of Federal Claims shall have jurisdiction to render any judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department. . . .

28 U.S.C. § 2201 provides in pertinent part:

> (a) In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2202 provides:

> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

Federal Rule of Civil Procedure 57 provides in pertinent part:

> The procedure for obtaining a declaratory judgment pursuant to Title 28 U.S.C. § 2201, shall

> be in accordance with these rules . . . The existence of another adequate remedy does not preclude judgment for declaratory relief in cases where it is appropriate . . .

Regulations:

See Appendix E attached.

STATEMENT OF THE CASE

Holloway was a Navy Commander in Reserve status on active duty in the U.S. Navy serving in what is referred to as a "Canvasser Recruiter" prior to her release from active duty on 01 July 1997. She has been promoted to Captain subsequently while in active Reserve status. The Navy had implemented a program pursuant to statute (see footnote 2) entitled "Temporary Early Retirement Authority" ("TERA"), and Holloway had met all the requirements of the implementing statute applicable to Reserves on active duty. Holloway applied for TERA both to Navy administrative authorities and then to the Board for Correction of Naval Records ("BCNR"), but said application was denied by both authorities, the first while she was on active duty, and the second by the BCNR on 26 October 1999. Naval authorities opined that while all other categories of Reserves on extended active duty were eligible for TERA, those as Canvasser Recruiters were not.

A. The Federal Court system conflict in terms of TERA:

Insofar as is known, Holloway is the first application made to a U.S. District Court under authorized jurisdiction to obtain declaratory relief that she is and was eligible at the

time for TERA as a Reserve officer on active duty and that the disqualification of eligibility under regulation is and was void. Had she been able to argue such on the merits of her application for relief, Holloway would have presented a compelling case that the exclusion of Canvasser Recruiters from eligibility for TERA is (1) a violation of the policy provisions against discrimination as prohibited by Congress in 10 U.S.C. § 10209, (2) arbitrary and capricious adoption of exclusion in a regulation without a distinction in the categories which allowed TERA, and (3) a manifest abuse of discretion for not awarding her TERA, both initially under the regulation and before the BCNR within the scope of its authority. In short there is no difference in terms of status between Canvasser Recruiters and all other Reserve classifications on active duty otherwise eligible for TERA. She presented these arguments before the BCNR.

TERA has been argued in two different settings before the U.S. Court of Federal Claims. In *Greek v. United States*, 44 Fed. Cl. 43 (1999), a Coast Guard regulation excluded Reserve officers from TERA, and the Court of Federal Claims held that it had no jurisdiction to hear this claim since the claim was barred by regulation. "Justiciability" of a claim by a Reserve on active duty was also cited to separately by the Court in *Greek* as disqualifying. In *McMullen v. United States*, 50 Fed. Cl. 718 (2001), the Army had no regulation, thereby violating the statute, and, thus, the statute itself was at issue. The Court of Federal Claims held here also that there was no jurisdiction as well as stating separately that the matter was not "justiciable".[3]

---

3. *McMullen* is pending oral argument in the U.S. Court of Appeals for the Federal Circuit, although McMullen is back on active duty in the Army having been recalled for the Iraq War, and a Motion (Cont'd)

Thus, Holloway's claims would have been dismissed by the Court of Federal Claims on the basis of these two cases, since her claim would have been decided either on the basis of *Greek id.* or *McMullen id.* The Court of Federal Claims does not have declaratory relief under this Court's decision in *Testan v. United States*, 424 U.S. 392 (1976). Holloway filed in the U.S. District Court for this reason seeking the declaratory relief which would have been denied her in the Court of Federal Claims, yet both the District Court and the Ninth Circuit indicated and, with full knowledge of these two cases, insisted that only the Court of Federal Claims has jurisdiction to hear her case. While she has a clear right to have a regulation reviewed under the Fifth Amendment Due Process Clause and this Court's decision in *Harmon v. Brucker*, 355 U.S. 579 (1958), she has been denied a forum in the federal court system to assert her claim, each possible court pointing to the other as the proper forum to hear it.

This Court needs to direct which Court has jurisdiction to hear the same and whether the concept of "justiciability" has any application at all in review of a decision of a military correction board under the subject matter jurisdiction of the board's authority.

B. Proceedings Below:

Holloway filed her complaint in the U.S. District Court for the Northern District of California at Oakland. The matter came before the Court on the Defendant's Motion to Dismiss.

(Cont'd)
for Summary Reversal of the Court of Federal Claims is pending on the ground that McMullen was wrongfully released from active duty in the first place and has been administratively reinstated and the case settled without Court approval.

After briefing, the Court granted the Defendant's Motion under Fed. R. Civ. P. 12(b)(1), and the District Court entered judgment of dismissal on October 20, 2000. Holloway's Motion for Reconsideration was denied on January 31, 2001. The Court of Appeals affirmed on October 11, 2002, and denied Holloway's Petition for Rehearing En Banc on February 4, 2003. All matters were timely filed.

REASONS FOR GRANTING THE WRIT

I. Mandamus Jurisdiction Coupled with Declaratory Relief

A. Policy:

Holloway relies on United States Supreme Court Rule 10(a) wherein the Ninth Circuit Court of Appeals has entered a decision in the above matter in conflict with the decision of the Fifth Circuit Court of Appeals styled *Turner v. Weinberger*, 728 F.2d 751 (5th Cir. 1984) on the issue of the applicability of mandamus jurisdiction and declaratory relief to seek monetary relief from the U.S. Government, or an agency thereof, in a U.S. District Court when the U.S. Court of Federal Claims, or its predecessor Court, has entered a decision dismissing a claim for the reason that that Court does not have jurisdiction to hear and decide the same claim for relief.

B. The Writ Should Be Granted to Decide Whether a U.S. District Court Has Jurisdiction under Mandamus Jurisdiction 28 U.S.C. § 1361 in Conjunction with Declaratory Relief When the U.S. Court Of Federal Claims Has Held It Is Without Jurisdiction to Declare Relief for the Same Claim for Monetary Relief

As indicated above, the U.S. Court of Federal Claims has heard two cases on the issue of a claim for payment of TERA to a military member, and in both cases the Court held that the Court did not have jurisdiction to hear and decide the matter. *Greek*, 44 Fed. Cl. at 43; *McMullen*, 50 Fed. Cl. at 718. It is unclear in both cases whether the Court of Federal Claims includes the judicial policy of "non-justiciability" within the penumbra of jurisdiction or is a separate ground for denial. To the extent that it may be the latter, "justiciability" as the basis for granting this Writ is set forth in issue III below.

With full knowledge of *Greek* and *McMullen*, the Ninth Circuit held that Holloway's claim for TERA is "non-justiciable" both in that Court and the District Court. App. A at 6a, affirmed App. D (see argument below). Unfortunately, the Ninth Circuit did not cite to these two cases separately as a basis of granting or denying mandamus jurisdiction. The Ninth Circuit relied, instead, on its authority that mandamus is not a waiver of jurisdiction, and, while Holloway argued both cases to the Court, more unfortunately, the Court did not cite to nor discuss *Turner*, 728 F.2d 751. When *Turner* clearly holds that mandamus jurisdiction is available to award monetary relief when the Court of Federal Claims has held that it does not have jurisdiction as to the same claim.

Turner id. claimed payment of a military bonus for medical doctors, called "Variable Incentive Pay" ("VIP"). *Turner* was filed in the U.S. District Court claiming mandamus jurisdiction. The reason for this claim of jurisdiction is and was that the then named Court of Claims dismissed the exact same claim for VIP for want of jurisdiction in *Adair v. United States*, 648 F.2d 1318 (Ct. Cl. 1981) (following this Court's decision in *Testan*, 424 U.S. 392). Since declaratory relief was necessary to overcome the limitation on jurisdiction imposed by the Court of Claims, *Turner* sought such relief coupled with mandamus in the U.S. District Court. The Fifth Circuit indicated that the District Court held that jurisdiction was proper under mandamus, but, notwithstanding, also agreed with the District Court that the claim was properly dismissed on the merits because of the discretionary nature of the claim. *Id.* at 755.[4] Fifth Circuit Court of Appeals held as to mandamus:

> The only means of review of the administrative action in this case is by way of mandamus. . . . This action was properly brought under 28 U.S.C. § 1361, which provides a remedy "in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the Plaintiff."

Id. at 755.

---

4. Discretion however did not apply to one sub-class, i.e. the CORD physicians. The Fifth Circuit agreed that discretion did not apply to the CORD physicians, but, instead, held on the merits that the CORD physicians had a "moral obligation to serve". While declaratory relief was granted by the Fifth Circuit in the sense that the CORD physicians were eligible, the Court, nevertheless, denied relief on highly questionable, indeed unconscionable, grounds not based on jurisdiction.

Thus, there is, therefor, a split in the Circuits on the availability of mandamus as a proper jurisdictional means of asserting a claim for a monetary payment under a military regulation with companion declaratory relief as to the regulation.

This is a proper basis of issuing the Writ applied for in this Petition, and the Writ should be granted on this basis accordingly.

This is an important question to be decided by this Court in that there are many claims for monetary payments in a variety of settings, not just by military personnel, calling for declaratory relief outside the jurisdiction of the Court of Federal Claims. It is up to this Court to clarify the issue.

II. Denial of Access to the Federal Court System

A. Policy:

Holloway relies on United States Supreme Court Rule 10(c) wherein the Ninth Circuit Court of Appeals, after having before it decisions denying jurisdiction by the U.S. Court of Federal Claims on the same issue, nevertheless held that the Court of Federal Claims does have jurisdiction. The Ninth Circuit has thereby decided an important question of federal law in a way that conflicts with this Court's decision in *Harmon*, 355 U.S. 579, leaving Holloway with no court to review her claim of the illegality of a regulation denying her the relief to which she is or otherwise should be entitled under statute for the reasons she asserts above in the Statement of the Case.

B. All Courts Having Possible Jurisdiction to Review Holloway's Claim Have Held That Each Does Not Have Jurisdiction to Review That Claim and, Indeed, Affirmatively Indicate That the Claim Resides in the Other Court

Holloway has been denied access to the federal court system for review of her non-frivolous claims for relief, both declaratory and monetary. For reasons set forth above, the regulation denying her eligibility for TERA is completely at odds with statute, case law, military practice, and court review of her claim. She needs either declaratory relief to set aside the regulation coupled with either mandamus relief from a U.S. District Court on remand to the U.S. District Court, or mandamus to the BCNR to implement the same. As indicated above, the Court of Federal Claims, as well as this Court in *Testan*, 424 U.S. 392, has held that the Court of Federal Claims is without jurisdiction to declare or otherwise act or set aside a regulation or a statute which does not "in itself" (to use the words of *Testan*) authorize relief. To add confusion to the problem, the Court of Federal Claims engrafts the concept of "justiciability" on claims of Reserve officers starting with the leading case of *Murphy v. United States*, 993 F.2d 871 (1993), and then states that review, contrary to the Ninth Circuit, lies in a U.S. District Court to declare rights. (*See* Argument below)

As both the Ninth Circuit and the U.S. District Court would have it, both would deny that the U.S. District Court is the proper forum to review the claimed right to relief by a military person. App. "A" at 6a, where the Ninth Circuit stated: "The proper jurisdictional question in this case is whether the Claims Court (sic) offers adequate remedies assuming Holloway has asserted a cognizable and justiciable

right, not whether she can ultimately receive the remedies offered." With all due respect to the Ninth Circuit, this statement is patent nonsense and at odds with why our court systems are established to review cases and assign jurisdiction, which is, in Holloway's matter, to review a regulation in line with *Harmon*, 355 U.S. 579. *See also Murphy*, 993 F.2d 871. Moreover, and most importantly, when the referenced court will not grant relief because it has no power to do so within its jurisdiction, that is, plainly stated, a denial of jurisdiction for any purpose in that referenced Court without regard to remedy.

Companion with the previous U.S. Supreme Court cases cited above is this Court's decision in *Larionoff v. United States*, 431 U.S. 864 (1977). *Larionoff* is a military case involving a claim for a bonus, and this Court *declared* on the basis of Court of Federal Claims jurisdiction a regulation as to these claimants void holding that the discretion of the Secretary is limited even though the statute grants discretion and the word "may" conditions eligibility. *Larionoff* was decided a year *after Testan*, 424 U.S. 392, leaving confusion in the Court of Federal Claims as to which precedent applies, and the Court of Federal Claims has arbitrarily eschewed following *Larionoff* and follows *Testan*. *See* discussion by this Court in *Larionoff*, 431 U.S. at pp. 873, *et seq.*, as to the Declaratory relief. *Larionoff* did not cite to *Testan* at all in declaring relief.

This Court in *Larionoff id. declared* the regulation of the Secretary of the Navy void as contrary to statute. There appears to be no case law in the Court of Federal Claims subsequent to *Larionoff declaring* a regulation to be void.[5] There is no discussion in *Larionoff* as to "justiciability"

5. Although see argument below as to justiciability and review of a military correction board.

even though it is reasonable to assume that some of the claimants were Reserves on active duty. (*See* argument III below.) In this connection, there is no discussion whatsoever by this Court in any known case as to "justiciability" as to persons holding military status, whether or not Reserves or in any other military status.

Returning to *Harmon*, 355 U.S. 579, where does Holloway file her claim to obtain the declaratory relief she needs to establish her claim? The purpose of this Writ is for this Court to state where her claim should be filed and guide that Court.

In a leading case decided by the predecessor court to the U.S. Court of Appeals for the Federal Circuit, *Sanders v. United States*, 594 F.2d 804 (Ct. Cl. 1979) has stated, "Where a correction board fails to correct an injustice or a passover is challenged but a back pay claim has arisen, plaintiff's remedies, if any, would be in the district court by mandamus, 28 U.S.C. § 1361, or declaratory judgment, 28 U.S.C. § 2201." *Id.* at 810, n.10. *Sanders* also applies *Testan*, 424 U.S. 392, *id.* at 810. Holloway did, following *Sanders*, seek relief before a U.S. District Court on these two grounds, yet both the District Court and the Ninth Circuit state that jurisdiction lies in the Court of Federal Claims. The Court of Appeals for the Federal Circuit has held that there is no jurisdiction to review the claim of Reserve officer "absent pure legal error". *Murphy*, 993 F.2d at 874. The Court of Appeals added,

> Perhaps Murphy could have sought correction of his records through the Administrative Procedures Act in the district court. (cases cited) (Although "request for retroactive promotion falls squarely

> within the realm of nonjusticiable military personnel decisions," judicial revue of decisions involving the correction of military records is available under the Administrative Procedures Act, 5 U.S.C. § 701(a)(2) (sic).

Id. at 874. Holloway *did*, following *Murphy*, seek review under the APA, and the District Court and the Ninth Circuit both held, nevertheless, that review is in the Court of Federal Claims.

Again, where is Holloway to go to seek relief?

In response to this question, Holloway believes that the case should be heard by the U.S. District Court under either 28 U.S.C. § 1331, with direction to the District Court to refer the matter back to the BCNR to implement relief in accordance with the Court's opinion; or, under mandamus jurisdiction after companion declaratory relief under 28 U.S.C. § 2201 and § 2202 and 5 U.S.C. § 702 in U.S. District Court directing the Respondents directly to do so; or, mandamus directing the BCNR to do so. With respect to § 1331 and mandamus to the BCNR, Holloway's request has compelling precedent in one of the Ninth Circuit's own cases, *Guerrero v. Stone*, 970 F.2d 626 (9th Cir. 1992), and the Ninth Circuit refuses to follow its own authority wherein Mandamus was directed *Id.* at 639.

Additionally, Holloway argued for the application of Fed. R. Civ. P. 57 which states very plainly that the district court should grant declaratory relief even though there is another adequate remedy, and both the Ninth Circuit and the U.S. District Court in Holloway's matter ignored that rule. Fed. R. Civ. P. 57 is noted for the paucity of authority interpreting the rule.

Thus, this quagmire of federal jurisdiction in all courts, conflicting precedent of and by this Court, lack of clarity between the two circuit courts, lack of clarity between the U.S. District Court and the Ninth Circuit in Holloway's claim, as well as between both of those courts on the one hand and the Court of Federal Claims on the other, and absence of direction by this Court, all lead to the unassailable conclusion that this Court must grant this Writ to resolve all of these issues, most importantly to tell the courts where Holloway may have her claim heard somewhere in the federal court system.

III. "Justiciability" Should Not Be Ascribed by Either a U.S. District Court Or the U.S. Court of Federal Claims to a Claim by a Military Reserve Officer When Either Court Reviews a Decision by a Military Correction Board Established under 10 U.S.C. § 1552 under Concepts of Subject Matter Jurisdiction

A. Policy:

Holloway relies on Rule 10(c) of this Court as the Ninth Circuit, U.S. District Court, and the U.S. Court of Federal Claims have indicated that the judicial concept of "justiciability" applies to claims of Reserve officers on active duty after review of a decision of a military correction board under 10 U.S.C. § 1552 without taking into account that each court's review is limited to and by the same subject matter jurisdiction of the military correction board under the Congressional mandate "to correct error and remove injustice".[6] This Writ application raises an important question

6. The Ninth Circuit has stated that Holloway should file her matter in the Court of Federal Claims. If her matter does, in fact, (Cont'd)

of federal law that has not been, but should be, settled by the U.S. Supreme Court, since all courts have not squarely decided, or refuse to decide, this issue of limiting their review to the scope of the subject matter jurisdiction conferred on a military correction board. This is an extremely important issue to Reserve officers on active duty and other military personnel in other settings or status, since otherwise meritorious claims are being systematically dismissed in all courts on the basis of alleged "justiciability".

B. No Case in the Ninth Circuit Or in the Court of Appeals for the Federal Circuit Or in the U.S. Court of Claims Or in this Court Has Squarely Held That Review by a Court of a Decision by a Military Correction Board Removes Review of That Case from the Concept of "Justiciability" on the Ground That the Reviewing Court Is Limited in Its Review to the Scope of the Subject Matter Jurisdiction Conferred on a Correction Board

Holloway's claim was dismissed in part based on the concept of "justiciability" since she was a Reserve officer on active duty and Reserve officers serve at the pleasure of the Secretary of the military department. *Murphy*, 993 F.2d 871, citing to 10 U.S.C. § 681a, *id.* at 872 (now codified in 10 U.S.C. § 12313(a)) Holloway applied for TERA before the BCNR, and said relief was denied.

(Cont'd)

have to end up in the Court of Federal Claims, this issue should be decided now by this Court, if for no other reasons than fairness to Holloway, judicial economy, and guidance to the Court of Federal Claims. This is one reason why the Court of Federal Claims is included in this argument.

Holloway argued to the Ninth Circuit that the subject matter jurisdiction limitation of military correction boards is imposed on reviewing courts as limiting the courts to the same subject matter jurisdiction as that of the military correction board. Holloway argued that no case in any court, including this Court, has ever held precisely that review by a military correction board removes the case from the legal doctrine of "justiciability" in the reviewing court on appeal. The reason is that the subject matter jurisdiction of a military correction board is limited "to correct an error or remove an injustice." 10 U.S.C. § 1552. The reviewing court has the same power, the same as any other appellate court under the original jurisdiction conferred, and, additionally, to ascribe the same to the status of the claimant as does the military correction board "to correct error or remove injustice." It would be different if the reviewing court sat hearing an original claim, absent review and decision by a military correction board. Then, in that case, "justiciability", or the lack of it, would or could be applied depending on the statute or regulation being reviewed.

Since 1993, the U.S. Court of Federal Claims has relied on *Murphy v. United States*, 993 F.2d 871, as precedent for applying the concept of "justiciability", or the lack thereof, to claims of Reserve officers on active duty. It should be noted at this point that *Murphy* held that "justiciability" is separate from jurisdiction and "must first [be] assess[ed] . . . by determining what limits were placed on the Secretary's discretion to release a reserve (sic) officer from active duty." *Id.* at 873 The Court then in *Murphy* discussed the applicability of the jurisdiction (*not justiciability*) conferred

on a military correction board as limiting review by the Court of Appeals for the Federal Circuit:

> Section 1552(a) describes the Correction Boards' jurisdiction to act on behalf of the Secretary to "remove and injustice." It says absolutely nothing about the Claims Court's jurisdiction which is circumscribed solely by the Tucker Act, 28 U.S.C. § 1491, and which demands that the government be called upon to answer in money. Absent that, there is no review in the Claims Court of alleged "injustice".

Id. at 874[7]

The Ninth Circuit decision in *Holloway* in App. A, p. 6a, is also squarely in conflict with the Court of Appeals of the Federal Circuit on the issue of whether "justiciability" is a part of jurisdiction—the Federal Circuit saying no in *Murphy*, *Id.*; the Ninth, yes in *Holloway*.

Cases do discuss the subject matter jurisdiction of a military correction board in relation to error and injustice, but do not reach the issue as argued here as to elimination of "justiciability" in review of a military correction board decision. *See, generally*, *Sanders*, 594 F.2d at 804; *Murphy*, 993 F.2d at 871; *Reale*, 208 Ct. Cl. at 1010; *Sawyer*, 18 Cl. Ct. at 860.[8] *Sanders* involves the claim of a Regular

---

7. This language is squarely in conflict with the language of the Court of Appeals for the Federal Circuit in *Sawyer v. United States*, 18 Ct. Cl. 860 (1989), *rvrsd on other grounds*, 930 F.2d 1577 (CAFC 1991), and *Reale v. United States*, 208 Ct. Cl. 1010, *cert. denied*, 429 U.S. 854 (1976), *cert. denied*, 429 U.S. 988 (1976).

8. Two cases before the Court of Appeals for the Federal Circuit are pending decision on this issue. *McMullen v. United States*, (Cont'd)

officer, but nevertheless that which is argued for here is still applicable in terms of the subject matter jurisdiction of the reviewing court, or the lack of reference to the issue, as reflected in the opinions of the courts.

What has occurred here in both the U.S. District Court and the Court of Federal Claims is that the concept of "justiciability" has been engrafted onto claims of Reserve officers, which includes Holloway, by this authority. That authority is, however, in violation of the subject matter jurisdiction of a military correction board as conferred by Congress.

This Court must review this issue since none of the Courts below can reach any kind of uniformity as to the scope of the doctrine of "justiciability" when a court reviews a decision of a military correction board.

(Cont'd)

No. 02-5054, as set forth in footnote 2 herein, and *Fisher v. United States*, No. 02-5082. This Court may well want to defer decision on this Writ until one or both of these cases are decided, since there may well be a split in the circuits between *Holloway* and one or both of these cases. Unlike *McMullen*, *Fisher* was argued on December 2, 2002.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

JAMES BYRON HOLCOMB
Attorney for Petitioner
P.O. Box 10069
Bainbridge Island, WA 98110
(206) 842-8429